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8

9 IN THE UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 PEDRO DURAN,

15 Defendant.

16 CASE NO. 1:20-CR-00096-JLT-SKO

17 STIPULATION REGARDING EXCLUDABLE  
18 TIME PERIODS UNDER SPEEDY TRIAL ACT;  
19 ORDER

20 DATE: October 19, 2022

21 TIME: 1:00 p.m.

22 COURT: Hon. Sheila K. Oberto

23

24 BACKGROUND

25 This case is set for status conference on October 19, 2022. On May 13, 2020, this Court issued  
26 General Order 618, which suspends all jury trials in the Eastern District of California “until further  
27 notice.” Under General Order 618, a judge “may exercise his or her authority to continue matters,  
28 excluding time under the Speedy Trial Act with reference to the court’s prior General Order 611 issued  
on March 17, 2020 . . . with additional findings to support the exclusion in the Judge’s discretion.”  
General Order 618, ¶ 6 (E.D. Cal. May 13, 2020). In addition, any judge “may order case-by-case  
exceptions” to General Order 618’s provisions “at the discretion of that Judge or upon the request of  
counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will  
impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020). This, previous,  
and subsequent General Orders were entered to address public health concerns related to COVID-19.

29 Although the General Orders address the district-wide health concern, the Supreme Court has

1 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive  
 2 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.  
 3 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no  
 4 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at  
 5 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a  
 6 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally  
 7 or in writing").

8 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory  
 9 and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-  
 10 justice continuances are excludable only if "the judge granted such continuance on the basis of his  
 11 findings that the ends of justice served by taking such action outweigh the best interest of the public and  
 12 the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable  
 13 unless "the court sets forth, in the record of the case, either orally or in writing, its reason or finding that  
 14 the ends of justice served by the granting of such continuance outweigh the best interests of the public  
 15 and the defendant in a speedy trial." *Id.*

16 The General Orders exclude delay in the "ends of justice." 18 U.S.C. § 3161(h)(7) (Local Code  
 17 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,  
 18 natural disasters, or other emergencies, this Court has discretion to order a continuance in such  
 19 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance  
 20 following Mt. St. Helens' eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court  
 21 recognized that the eruption created "appreciable difficulty" for the trial to proceed. *Id.* at 767-69; *see also*  
 22 *United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time  
 23 following the September 11, 2001 terrorist attacks and the resultant public emergency).

24 The coronavirus poses a similar, albeit more enduring, "appreciable difficulty" to the prompt  
 25 proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a "non-  
 26 exhaustive" list of seven factors it found to be "relevant" in considering ends-of-justice Speedy Trial Act  
 27 continuances "in the context of the COVID-19 pandemic." *United States v. Olsen*, --- F.3d ---, 2021 WL  
 28 1589359 at \*7 (9th Cir. Apr. 23, 2021). That non-exhaustive list includes: (1) whether a defendant is

1 detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked  
2 speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a  
3 population that is particularly susceptible to complications if infected with the virus; (5) the seriousness  
4 of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes;  
5 (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed;  
6 and (7) whether the district court has the ability to safely conduct a trial. *Id.*

7 In light of the foregoing, this Court should consider the following case-specific facts in finding  
8 excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7)  
9 (Local Code T4). If continued, this Court should designate a new date for the status conference. *United*  
10 *States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be  
11 “specifically limited in time”).

## 12 STIPULATION

13 Plaintiff United States of America, by and through its counsel of record, and defendant, by and  
14 through defendant's counsel of record, hereby stipulate as follows:

15 1. By previous order, this matter was set for status conference on October 19, 2022.

16 2. By this stipulation, the parties now move to vacate the status conference and set the case  
17 for trial confirmation hearing on April 21, 2023 at 9:00 a.m. and a trial on until May 8, 2023, at 8:30  
18 a.m., and to exclude time between October 19, 2022, and May 8, 2023, under 18 U.S.C.  
19 § 3161(h)(7)(A), B(iv) [Local Code T4].

20 3. The parties agree and stipulate, and request that the Court find the following:

21 a) The government has represented that the discovery associated with this case  
22 includes investigative reports, numerous photographs and videos, hundreds of hours of recorded  
23 telephone conversations pursuant to wiretap order, cellular phone extractions, and large amounts  
24 of cellular telephone precise location data. The discovery is voluminous and consists of over  
25 31,000 pages. All of this discovery has been either produced directly to counsel and/or made  
26 available for inspection and copying.

27 b) Counsel for defendant desires additional time to consult with his client, conduct  
28 further investigation, review the voluminous discovery, prepare for a trial, and continue to

1 explore a potential resolution of the case.

2 c) Counsel for defendant believes that failure to grant the above-requested  
3 continuance would deny him/her the reasonable time necessary for effective preparation, taking  
4 into account the exercise of due diligence.

5 d) The government does not object to the continuance.

6 e) In addition to the above-stated reasons, a continuance in this case is particularly  
7 appropriate because the defendant is not detained pending trial.

8 f) Based on the above-stated findings, the ends of justice served by continuing the  
9 case as requested outweigh the interest of the public and the defendant in a trial within the  
10 original date prescribed by the Speedy Trial Act.

11 g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,  
12 et seq., within which trial must commence, the time period of October 19, 2022 to May 8, 2023,  
13 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4]  
14 because it results from a continuance granted by the Court at defendant's request on the basis of  
15 the Court's finding that the ends of justice served by taking such action outweigh the best interest  
16 of the public and the defendant in a speedy trial.

17 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the  
18 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial  
19 must commence.

20 IT IS SO STIPULATED.

21  
22 Dated: October 18, 2022

PHILLIP A. TALBERT  
United States Attorney

23  
24  
25 /s/ JUSTIN J. GILIO  
26 JUSTIN J. GILIO  
27 Assistant United States Attorney  
28

1 Dated: October 18, 2022

/s/ Anthony P. Capozzi

2 Anthony P. Capozzi

3 Counsel for Defendant

4 PEDRO DURAN

5

6 **ORDER**

7 IT IS SO ORDERED.

8

9 Dated: 10/18/2022

10 *Sheila K. Oberto*

11 THE HONORABLE SHEILA K. OBERTO

12 UNITED STATES MAGISTRATE JUDGE